

# BEST PRACTICES IN GRIEVANCE HEARINGS



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**Office of Employment Dispute Resolution**

Virginia Department of Human Resource Management

# Learning Objectives

- Provide an overview of grievance hearings
- Discuss how the best practices for being successful at a grievance hearing begin early on
- Discuss HR's role in effective hearings practice
- Review pitfalls to avoid in taking disciplinary action
- Understand what hearing officers must find to uphold disciplinary actions

# Overview of hearings

- EDR conducted 151 hearings during FY 2016.
- Of those 151 hearings, 148 or 98% involved disciplinary actions or terminations.
- 65 % of the hearings held in FY 2016 involved terminations.

# Avoid Hearings, not Discipline

- Issue discipline when warranted ... do not wait!
  - Completely avoiding issues gets you nowhere
    - Lose good employees
  - Misconduct and performance issues worsen and spread
  - Inconsistent treatment
    - Terrible for morale
    - Eventual losses at hearing due to mitigation
- Trusted supervisors make good decisions
  - Develop culture of trust and credibility in supervisors
  - Hold supervisors accountable
  - When trusted, less likely to receive complaint
  - If challenged, good decisions are upheld

# Destroy credibility by...

- Broken promise
- Inconsistent treatment
- Failing to keep confidences
- Perceived arbitrary or unfair actions
- Lack of communication
- Failing to share information

# Build employee trust

- Open and effective communication
- Listen to employees
- Model good behavior (performance, attitude, appearance)
- Treat everyone fairly and respectfully
- Demonstrate competence
- Do not avoid issues
- Recognize good performance
- Give credit; be accountable

# EDR Services

## Workplace Conflict Consultation Program

Conflict  
Coaching

Conflict  
Management  
Skill Building  
Trainings

One-on-One  
Phone  
Consultations

Workplace  
Mediation

- Improve workplace dynamics by coaching up supervisors
- Encourage supervisors and employees to communicate more effectively – mediate when appropriate
- Training in conflict management
- Call EDR's **confidential** AdviceLine at **888-232-3842**

# HR's Role is Crucial

- Listen to employees and...
- Reality check; discover context
  - Ask a question if it does not sound right...
- Step in to take action when appropriate
- Direct to helpful resources
- Review Written Notices before issuance
- Be involved in hearing preparation/presentation
- Guide agency to demonstrate a measured response – the story of reasonableness through the hearing officer's eyes



# Documentation

- The goals of documentation are to create a record showing—
  - That the facts occurred the way you say they did;
  - That the employee was given clear notice of the expected behavior and/or performance;
  - That the employee was given adequate opportunities to correct the problems with behavior/performance; and
  - That the employee was treated in a manner consistent with the manner in which other employees have been treated.

# Documentation Pitfalls

- Maintaining documentation only for “problem” employees.
- Documenting problems in supervisory notes but failing to address problems with employee.
- “Papering” a file--creating excessive documentation, particularly over minor issues.
- Documenting problems, based on memory, long after conduct occurs: documentation should be as contemporaneous as possible.
- Disciplining an employee without documentation showing employee was advised conduct/behavior was problematic

# What does due process require?

## **Pre-disciplinary due process**

Notice

Supporting facts

Time to Respond (24 hrs. minimum; maybe more if a serious action...)

## **Post-disciplinary due process**

Met by Grievance Procedure and Hearing

# Written Notice

- The purpose of a Written Notice form is to give the employee the notice and explanation of the charge.
- The goal in preparing a Written Notice form is to **accurately** describe the misconduct.
- Under DHRM Policy 1.60, corrective action should occur as soon as the agency becomes aware of the problem.
- Mitigating circumstances should be considered and the agency's analysis should be described on the Written Notice form.
- In disciplinary cases, the hearing officer is limited by the content of the Written Notice.

# Written Notice Pitfalls

- Overreaching—for example, where an employee fails to follow a policy (a Group II), giving the employee a Group III for undermining agency operations
- Combining several Group I or Group II offenses into a single Group III, or including multiple charges of different levels on the same Written Notice
- Taking the “everything but the kitchen sink” approach in a case where retaliation could be an issue
- Failing to identify the proper policy or charging the employee under the wrong policy—for example, giving an employee a Group II for “Workplace Harassment” where no protected status or conduct is at issue

# The Standard of Proof

A party must prove its case by the “**preponderance of the evidence**”

What is a preponderance of the evidence?

- Evidence that indicates that your theory of the case is **more likely to be true than not true**
- This means the evidence you present at the hearing must be **more convincing** than the opposing party's



# Elements for Disciplinary Hearings

The agency must show:

- The employee **engaged in the behavior** described in the Written Notice
- The behavior constituted **misconduct**
- The agency's discipline was **consistent with law and policy**

# Specific Disciplinary Issues

- Disruptive Behavior – Was it really disruptive?
- Internet Use – Evidence? Consistency?
- Social Media – First Amendment issues
- Sleeping – Be prepared to describe in detail!
- Undermining the effectiveness of the agency – prove it!
- Bullying – Not defined but can be addressed under SOC
- Off-duty conduct – must have connection to workplace



# Questions that can arise

- Consider ADA/FMLA in case involving employee medical issues (e.g., excessive absenteeism and/or tardiness)
- Departing from SOC defaults
- Was that criminal conviction overturned on appeal?
- Employee intent in a falsification case
- Disciplining for “implied” instruction
- Remember to include policies in evidence!

# Identify Your Best Evidence

Qualities to look for in your witnesses:

- **Direct knowledge** of events
- **Reliable** memory
- **Credible** presentation

Selecting documents:

- Do not include repetitive or unimportant documents
- Avoid those that are **overly technical or confusing**
- Use witnesses to **explain** your documents

# Prepare Your Witnesses

- Outline **questions** to ask each witness
  - Ask **open-ended questions** whenever possible
  - Go over with your witnesses ahead of time
- **Do not script** your witnesses' testimony
  - Discuss what facts you want each witness to testify about
- **Anticipate** testimony of opposing side's witnesses and **plan** how to respond

# Your Witnesses Tell the Story

Typically lead with a witness who can tell **as much of the story as possible**

- Have the witness paint a picture of the events

Rely most on witnesses who:

- Are **more knowledgeable and credible**
- Can testify about more **significant events**
- Have **first-hand** knowledge

# Know Your Audience

Your goal is to present your evidence so **anyone** can understand your arguments

- Present your case chronologically or in logical order
- Be clear about dates, times, and locations
- Name people and describe agency organization
- Explain agency terms, procedures, and any other special considerations

# Explain the agency's theory

- Should be apparent in documentation
- **What is special about your case?**
- Present in opening – connect the dots for the hearing officer through evidence during in closing

# Unavailable Witnesses

- Witnesses may **testify by phone** if unable to attend in person
  - Make a **good faith effort** to produce the witness and show good reasons for his/her absence
- Consider **recording statements** ahead of time
  - Ask the hearing officer in advance if you intend to record testimony
- Possible adverse consequences for no-show witnesses

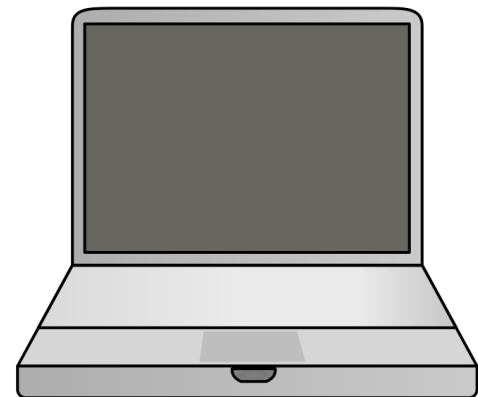
# Mitigation

- Hearing officers only mitigate if the discipline **exceeds the limits of reasonableness**
- Common examples:
  - Lack of notice
  - Inconsistent discipline
  - Disparate treatment
- Grievants must present evidence regarding any issues with the agency's mitigation decision
- Agency advocates must show that mitigating and aggravating factors were considered



# Research the Rules

- EDR's website:  
<http://www.dhrm.virginia.gov/edr>
  - *Grievance Procedure Manual*
  - *Rules for Conducting Grievance Hearings*
  - Prior EDR rulings and hearing decisions
  - Basic Skills for Presenting Your Case at Hearing
- Call EDR's AdviceLine  
at 888-232-3842



# Closing



Please contact us anytime

1-888-232-3842 (1-888-23-ADVICE)

EDR@dhrm.virginia.gov

Thank you!